No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1952

ROY WEBBER TINDER, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM SUGGESTING THAT THE WRIT OF CERTIORARI BE DISMISSED

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This case involves a conflict between the decision below (193 F. 2d 720) and the earlier decision of the Ninth Circuit in *Armstrong* v. *United States*, 187 F. 2d 954, which the court below declined to follow (193 F. 2d at 724), as to the proper construction of the misdemeanor provision contained in the fourth paragraph of Section 1708 of the

1948 revision of the criminal code (18 U.S.C. [1946 ed.], Supp. V, 1708).[1]

The indictment in each of these cases charged simply that the defendant stole letters from authorized depositories for mail matter. Each defendant pleaded guilty, was sentenced to imprisonment for more than one year,[2] and thereafter, by

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[1] "Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter of mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled or abstracted—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both; but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[2] The Bureau of Prisons advises that, based upon the present computation of petitioner's good time allowances, he will be eligible for conditional release from his three year sentence on January 3, 1953.

motion in the sentencing court, challenged the sentence as excessive on the ground that since the indictment did not allege that the stolen letters were of a value of more than $100, the maximum imprisonment which could lawfully have been imposed was one year. In the *Armstrong* case, the Ninth Circuit agreed with this contention, holding that the misdemeanor provision of the fourth paragraph of Section 1708 applied to all the offenses defined in the section. In the instant case, on the other hand, the Fourth Circuit sustained the Government's contention that this provision applied only to removing an "article or thing" of value from a unit of mail, and not to theft of a whole unit of mail, such as a letter.

As noted by both Courts of Appeals, this controversy stems from the 1948 revision of the mail theft statute. Prior to the revision, the applicable provision, Section 194 of the Criminal Code of 1909 (18 U.S.C. [1946 ed.] 317), made no distinction in the penalties provided for the offenses defined therein; all were punishable by a fine of not more than $2,000 or imprisonment for not more than five years, or both. The reviser's only explanation (see 18 U.S.C. [1946 ed.], Supp. V, p. 959) of the addition of the misdemeanor provision in Section 1708 was a reference to Sections 641 and 645 of Title 18, which punish, respectively, theft and embezzlement of property of the United States and embezzlement by court officers, and

which contain similar provisions limiting the punishment to a fine of $1,000 and/or imprisonment for not more than one year where the value of the property taken does not exceed $100.

Following the *Armstrong* decision of the Ninth Circuit, the Postmaster General, later joined by the Attorney General, protested to Congress that the effect of the decision was to divide "the crime of theft of mail into felonies and misdemeanors, with the value of the matter stolen as the determining factor." It was pointed out that this was an artificial distinction having no relation to the intent of the thief, that in a great many cases it is impossible to place a pecuniary value on stolen mail matter, that the offense against the mails is the same regardless of the value or lack of value of the stolen item, and that "Historically, the sanctity and integrity of the mails has been a matter which the Congress and this [Post Office] Department have regarded as being of the utmost importance." It was proposed, therefore, that Section 1708 be amended by eliminating the misdemeanor provision. (S. Rep. No. 980, 82d Cong., 1st sess., pp. 3-4; H. Rep. No. 1674, 82d Cong., 2d sess., pp. 3-5.)

When our memorandum in reply to the petition for a writ of certiorari was filed on March 28, 1952, the Court was advised that a bill to that end (S. 2198) had passed the Senate on October 19, 1951 (97 Cong. Rec. 13542), and that on March 20, 1952,

the Judiciary Committee of the House had ordered the bill to be reported favorably.[3] The bill was not enacted, however, before the adjournment of the Court's 1951 term, and on June 9, 1952, the writ was granted. Thereafter, the bill passed the House and was approved on July 1, 1952.[4]

With the elimination of the misdemeanor provision of Section 1708, Congress has put to rest the question of interpretation underlying the conflict of decisions which, we assume, led the Court to grant certiorari in this case. Now, as before the 1948 revision (see p. 3, *supra*), all the offenses defined in the section are felonies, punishable by a maximum fine of $2,000 and/or imprisonment for not more than five years. This change in the statute does not, of course, effect prior violations, such as petitioner's, but it does make the issue of no future importance. As to the effect upon petitioner's sentence, see note 2, *supra*, p. 2.

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[3] Thereafter, on March 31, the House Committee submitted such a report (H. Rep. No. 1674, *supra*).

[4] P. L. 432, 82d Cong., 2d sess. (66 Stat. 314): "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the fourth paragraph of section 1708, title 18, United States Code, is hereby amended by changing the semicolon to a period and by striking out the clause reading 'but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.'"

In view of this development since the writ was granted, we suggest that the Court may deem it appropriate to dismiss the writ.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1952.

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